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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-611

I. VASILIOS,

Defendant and
Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Petitioner, I. VASILIOS, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered on July 5, 1979; petition for rehearing denied on August 30, 1979, as follows:

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, is reported and appears at Appendix A, infra. The denial of the Petition for Rehearing entered by the United States Court of Appeals for the Fifth Circuit, appears as Appendix B, infra.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on July 5, 1979. See Appendix A, infra. A Petition for Rehearing was denied by said Court on August 30, 1979. See Appendix B, infra. This petition for certiorari is filed less than 30 days from the date the Petition for Rehearing was denied.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

QUESTIONS PRESENTED

It is petitioner's contentions that he was denied due process of law and his right to a fair trial by the denial of his motion for a separate and subsequent trial, wherein co-defendant Brewer's testimony would have rebutted the only evidence upon which the jury verdict could

be sustained and that at a separate trial he would not have been unduly prejudiced because of the taint of evidence produced against his co-defendant, Alexander.

The questions presented here are:

1. Did the Court of Appeals Decide A Federal Question In Conflict With This Court's Decisions Concerning A Defendant's Right To A Fair Trial In A Conspiracy Case Where There Is A Great Disparity In the Weight Of Evidence?; and

2. Did the Court of Appeals Decide A Federal Question In Conflict With This Court's And Other Court Of Appeals Decisions And Has Sanctioned A Departure By a Lower Court Requiring This Court's Supervision In An Instance Where The Trial Court's Refusal To Sever Petitioner's Case Resulted In A Denial of his Right to Due Process Of Law And his Right to A FAIR TRIAL?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Amendment No. V:

"No person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Constitutional Amendment No. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the. . . ."

3. 15 U.S.C. 77q(a):

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly--

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

4. 15 U.S.C. 77x:

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

5. 18 U.S.C. 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

6. 18 U.S.C. 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place

at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF FACTS

PRELIMINARY STATEMENT:

On February 24, 1977, an indictment was filed in the Southern District of Florida, charging petitioner, along with Howard Alexander, Robert Allen, Charles Diaz and James Brewer with 21 counts of mail fraud in violation of 18 U.S.C. 1341; 3 counts of violating the anti-fraud provisions of 15 U.S.C. 77q(a) and 77x and one count of conspiracy in violation of 18 U.S.C. 371. (Reporter's Transcript of Trial Proceedings p. 5-23, hereinafter referred to as "R.T.")

On July 15, 1977, Allen entered a plea of guilty to three counts of the indictment and became a key prosecution witness against the defendants in this case (R.T. p. 791).

On the same date, petitioner filed a motion for severance of his case from co-defendant Brewer, requesting that petitioner be tried subsequent to Brewer on the grounds that Brewer, by affidavit, stated that his testimony would be exonerating to petitioner (R.T. p. 118-122).

Petitioner and Alexander were tried first in a joint jury trial. At the close of the prosecution's case the Court granted petitioner's motion for judgment of acquittal as to 9 counts and directed acquittal as to Alexander as to twelve different counts (R.T. p. 195-196).

The jury found petitioner and co-defendant Alexander guilty as to all the remaining counts (R.T. p. 197-198, 220).

Petitioner was sentenced to two years imprisonment on count one of the indictment and as to the remaining counts, two years imprisonment, consecutive to the first count.

Co-defendant Diaz plead guilty. Co-defendant Brewer was tried subsequently and convicted of thirteen counts of the indictment. (Brewer did not testify at his subsequent trial.)

Petitioner filed a timely notice of appeal from the judgment from the United States District Court. The Court of Appeals consolidated the appeal of petitioner, Alexander and Brewer and on July 5, 1979 rendered its opinion affirming the convictions of all three defendants. See Appendix A, infra.

INTRODUCTION RE THE FACTS OF THE CASE

The Government alleged that from August 1972 to October 1974, the defendants entered into

a conspiracy to commit fraud concerning the sale of various bond issues. In 1972 defendants Alexander and Allen formed their own firm for the sale of bonds to the public. The firm of Alexander and Allen was financed by a $100,000 loan from a Mrs. Barbachano.

Petitioner did not commence employment with the company until Alexander's interest was purchased (November 1973) and petitioner went on payroll for the new company "R. J. Allen," as office administrator, in January 1974 (R.T. p. 887).

By the time petitioner became employed by Allen, the firm of Alexander and Allen was over $600,000 in debt and had failed to deliver bonds to many of its customers (R.T. p. 873).

The Government called over 55 witnesses to testify that all of the bond projects entered into by Alexander and Allen, prior to petitioner's employment with the company were fraudulent. During this period of time Alexander was the President of the company, Allen its Vice-President, Diaz was in sales and Brewer was a broker for the company. At the close of the Government's case the Court directed acquittal for petitioner on all bonds transactions preceding his employment with R. J. Allen. The gist of the remaining counts against petitioner concerned the AMC, Inc. bond issue and the activities of "R. J. Allen Associates."

THE EVIDENCE AGAINST PETITIONER:

Petitioner herein presents the evidence introduced against him in the light most favorable to the government and comments that out of the 55 witnesses called, the respondent's brief before the Court of Appeal cites the testimony of 4 witnesses.[1/] We detail these four witnesses' testimony because of their importance to the severance issue.

1. ROBERT J. ALLEN:

Robert Allen was indicted in this case on 25 counts, plead guilty to 3 counts and agreed to testify in the expectation of a reduced sentence (R.T. p. 791, 1082).

Initially, Alexander and Allen formed their company in the spring of 1972 (R.T. p. 802). In November 1973, Allen had Alexander's interest purchased by a straw man. Allen hired petitioner to administer the office and cut expenses, because

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1/ We note that the testimony of no other witnesses was relied upon by the Government or the Court of Appeal and a review of the trial testimony indicates that there were no other witnesses who directly implicated petitioner.

the company now, R. J. Allen, was over $600,000 in debt (R.T. p. 873, 880). At the same time Allen made petitioner office administrator, he promoted co-defendant Charles Diaz to sales manager (R.T. p. 888) and Vice President of the company.

Allen testified that petitioner administered the office according to Allen's policy determinations (R.T. p. 887). Petitioner advised Allen to obtain a loan so that the bonds could be purchased and delivered to the customers (R.T. p. 913-915). Allen represented to petitioner that the insurance covering the bonds was valid.

Government witness Ridgley, a former R. J. Allen employee testified that co-defendant Diaz, head of sales was the only one who falsely represented the status of the insurance. Allen testified that petitioner had no control over sales (R.T. p. 332-334, 887-888). Allen did not advise petitioner of the existence of any buy-back agreements held by customers (R.T. p. 1049-1062).

Allen stated that petitioner had no ownership or financial interest in the company and was not an officer or director of the firm (R.T. p. 1049, 1050). Petitioner took no part in the sales of any bonds nor the training of any salesmen, or in the writing of any literature (R.T. p. 1085, 2073-2075). Allen testified that petitioner was unaware of any representations made to customers (R.T. p. 1039, 1056).

In the spring of 1974 Allen and petitioner met with attorney Marx to discuss putting the company in bankruptcy. However, petitioner and/or the attorney advised against this procedure because of possible criminal sanctions against Allen (R.T. p. 893, 905).

Allen offered no other evidence against petitioner; rather the crux of his testimony incriminated Alexander, whose activities caused the huge indebtedness of the company prior to petitioner's arrival.

2. NICHOLAS DEMETRE:

Demetre, a convicted felon, was hired by Alexander and Allen to assist co-defendant Brewer (R.T. p. 759). He was Brewer's assistant from approximately November 1973 to June 1974, when he was discharged for taking a bond issue to a competitor (R.T. p. 783-784).

Demetre testified that commencing around May 1974 there were many customer complaints and if Allen was not there, petitioner would tell salesman to tell customers that the bonds would be delivered in a few days (R.T. p. 765, 777). Demetre testified that he had no knowledge as to whether or not these bonds were delivered. (R.T. p. 779)

3. HAROLD GOLDSTEIN:

Mr. Goldstein was twice convicted of fraud and was granted immunity to testify in this case (R.T. p. 2166-2167). Mr. Goldstein never met petitioner (R.T. p. 2174). At the grand jury Goldstein testified that petitioner was a "salesmanager or something" and he recited no conversations wherein Brewer discussed petitioner (R.T. p. 2190-2191).

At petitioner's trial, Harold Goldstein testified that Brewer told him that Brewer and petitioner had thought up the whole idea concerning the bonds and had carried this idea forward (R.T. p. 2156). Goldstein testified that Brewer told him that the financial statement of AMC was put together by a phony accountant and was false (R.T. p. 2186).

John Rider, a Certified Public Accountant, testified that he prepared a financial statement for AMC (R.T. p. 1196-1197). Rider verified a bank account of $99,000, but asked petitioner to verify a figure of $500,000 for assets for research and development (R.T. p. 1204-1205). Petitioner told Rider that only Brewer could verify that figure, which Brewer did in writing. (R.T. p. 1206)

4. DANIEL GOLDSTEIN:

Daniel Goldstein, the brother of Harold, and also convicted twice for fraud and testifying pursuant to immunity, testified that Brewer told him that petitioner ran the company. (R.T. p. 2213, 2219).

D. Goldstein visited the company for three weeks wherein Allen told him he owned the company and co-defendant Diaz told him that he was the one that made the company tick. (R.T. p. 2244-2246)

5. OTHER EVIDENCE PRODUCED BY THE GOVERNMENT

Nicholas Anastapoulos, investigator for the Securities and Exchange Commission, after reviewing the records, testified that during the ten month period petitioner was employed at R. J. Allen he received no money from the sales of bonds and a total salary of slightly over $19,000. (R.T. p. 3025)

Joy Sym, a CPA called by the government, testified that she was familiar with the books of Alexander and Allen and R. J. Allen. When Alexander left in November, 1973, over $600,000 was owed to customers. This amount was reduced to less than $350,000 by August 31, 1974, due to petitioner's efforts to cut expenses. (R.T. p. 2498-2499, 2509)

6. IN SUMMARY

The indictment charged all defendants with a single conspiracy, commencing in the spring of 1972 to October 1974, of misrepresenting bond sales and diverting funds to their own personal use.

Over 55 witnesses were called by the government to establish that Alexander and Allen had formed their company to carry out the purpose of the conspiracy with respect to several bond issues. The Government established that prior to petitioner's employment almost 2 million dollars had been taken in by the company and that over $600,000 was owed to customers.

At the close of the government's case the Court dismissed all counts against petitioner, except the conspiracy count and the counts pertaining to AMC and the activities of R. J. Allen after petitioner's employment. The AMC counts were dismissed against Alexander.

There is no question that the evidence produced by the Government established an illegal agreement between Alexander and Allen and that the completion of fraudulent bond sales had taken place prior to petitioner's employment. Further, there is no question that by the time Alexander left, the diversion of funds from the fraud was completed. The evidence is conclusive that petitioner did not divert funds, but rather, pulled the company out from under a $600,000 indebtedness to less than a $350,000 indebtedness.

The real question before the jury was whether or not petitioner, during his short employment with R. J. Allen, knowingly participated in a fraudulent scheme. The only damaging testimony imputing knowledge of fraud came from Harold Goldstein, a felon on grant of immunity, who related the alleged statements of co-defendant Brewer that Brewer said petitioner devised the scheme, carried it out and falsified the financial statement.

Brewer offered to testify for petitioner and to totally exonerate him. Brewer denied having the alleged Brewer-Goldstein conversations. We turn now to the facts surrounding the motions to sever.

THE MOTIONS TO SEVER:

1. The Pre-Trial Motion to Sever:

On July 14, 1979, co-defendant Allen plead guilty and it was known that he would be a prosecution witness. (Transcript entitled Court Proceedings, July 14, 15, 18, 19, 1977, hereinafter referred to as "C.T.," C.T. p. 3.)

Co-defendant Brewer's attorney moved to be relieved because petitioner's attorney had obtained an affidavit from Brewer that Brewer would give exonerating testimony for petitioner if petitioner's trial was subsequent to his trial. (C.T. p. 3-5) Petitioner's attorney stated that Brewer's testimony would be exculpatory beyond the affidavit, but that he could not speak to Brewer because Brewer's attorney so instructed him.(C.T. p. 15-17)

The Court denied the motion to sever based upon insufficiency of the affidavit.(C.T. p. 22) The Court advised petitioner's attorney that he could renew the motion and ordered petitioner's attorney and petitioner not to speak to co-defendant Brewer.(C.T. p. 23-25)

On July 18, 1977, Brewer's attorney was relieved.(C.T. July 18, 1977, p. 14) The Court severed Brewer's trial so that new counsel could prepare and the order forbidding contact with Brewer remained in effect.(C.T. July 18, 1977, p. 17) Petitioner's counsel moved for a continuance and asked that Brewer's trial go first, so that Brewer's testimony could be received.(C.T. July 18, 1977, p. 19) Counsel pointed out that he could not file a more complete affidavit because of the Court's order forbidding him to speak to Brewer, but that Brewer was an essential witness to prove that petitioner had no control over the company.(C.T. July 18, 1977, p. 20) The Court denied the motion to continue and the motion to sever.(C.T. July 20, 1977, p. 22)

2. The Second Motion to Sever:

Trial commenced on July 19, 1977. On July 22, 1977, petitioner's counsel called co-defendant Brewer's new attorney, Denis Dean, to the witness stand.(R.T. p. 608)

Mr. Dean testified that Brewer would testify for petitioner at a trial subsequent to his own. (R.T. p. 609) Mr. Dean stated that Brewer would testify that petitioner was hired to cut expenses and had no independent authority over the company; that petitioner urged Allen to borrow money so that the bonds could be delivered; and that the insurance which was purchased was bona fide.(R.T. p. 610-611) Mr. Dean stated that he instructed Mr. Brewer not to sign another affidavit because the government could use it to impeach him. (R.T. p. 611)

Petitioner's counsel also urged severance on the grounds that the indictment charged one over-all conspiracy, but in fact, the government was attempting to prove multiple conspiracies. (R.T. p. 620) The Court reserved ruling on the motion until Allen had completed his testimony. (R.T. p. 621)

After Allen testified, the Court rule that, in part, Allen admitted some of the exculpatory testimony that Brewer offered and therefore, Brewer's testimony was not needed.(R.T. p. 1188-1190)

3. The Third Motion to Sever:

After Harold Goldstein testified that Brewer told him that petitioner masterminded the operation; ran it and falsified the financial statement of AMC, counsel again moved for severance.(R.T. p. 2262) This testimony came as a surprise to counsel in that Goldstein had previously testified at the Grand Jury hearing that he and Brewer had no conversations about petitioner.(R.T. p. 2190-2191 and 2263-2264)

Counsel for petitioner advised the Court that Brewer would testify that the alleged Goldstein-Brewer conversations never took place. (R.T. p. 2262) The Court denied the motion. (R.T. p. 2264)

4. The Fourth Motion to Sever:

Petitioner's counsel recalled Mr. Dean, defendant Brewer's attorney. (R.T. p. 2848) Mr. Dean stated that if Brewer did not have a Fifth Amendment problem, Brewer would deny that petitioner had any control over the company or had any knowledge of a false financial statement. (R.T. p. 2848) The Court again denied the motion. (R.T. p. 2849)

THE OPINION OF THE COURT OF APPEAL

The Court of Appeal held that the demands of effective judicial administration and economy compel affirmance of the trial court's action; that there would have been three separate trials based upon the same factual testimony; and there was ample evidence to convict petitioner.

REASONS FOR GRANTING THE WRIT

INTRODUCTION:

Petitioner states that he was denied due process of law and right to a fair trial because the denials of his motions for severance precluded the jury from hearing the testimony of co-defendant Brewer which would have exonerated him as to each count and because the denial of severance caused petitioner to be tainted by the evidence presented against Alexander, which consisted of over 55 witnesses who testified about events predating petitioner's employment.

We present the second point first, and state that the cumulative effect in both instances commands issuance of this writ.

1. The Court of Appeals Has Decided a Federal Question In Conflict With This Court's Decisions Concerning a Defendant's Right to a Fair Trial In a Conspiracy Case Where There Is a Great Disparity In the Weight of Evidence.

The indictment in this case accused petitioner of conspiring with co-defendants Alexander, Allen, Diaz and Brewer to commit fraud and fraudulent acts commencing from 1972 to October 1974 with regard to the sale of Municipal bonds involving four or five different issues.

At the close of the government's case, the trial court dismissed all of the counts which predated petitioner's 1974 employment. The government presented in excess of 55 witnesses and only 4 of those witnesses implicated petitioner; Allen; who really did not directly incriminate petitioner; Demetre; who denied having actual knowledge of any criminal activities having been committed; and Harold and Daniel Goldstein; who both related the alleged hearsay statements of Brewer.

We therefore take exception to the Court of Appeal's finding that had petitioner been tried separately, the same factual evidence would have been presented. The government's case against petitioner consisted of 4 witnesses; Allen, Demetre, H. Goldstein and D. Goldstein.

This Court has long recognized that in conspiracy cases involving numerous defendants, the wide latitude accorded the prosecution in presenting evidence sometimes operates unfairly against an individual defendant. (Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680 (1942))

The "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass." (Kotteakos v. United States, 328 U.S. 750, 774, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946) and Blumenthal v. United States, 332 U.S. 539, 559-560, 68 S.Ct. 248, 92 L.Ed. 154 (1948).)

Where there is a great disparity in the weight of the evidence, the danger exists that the guilt of one defendant will improperly "rub off" on the others. (United States v. Kelly, 349 F.2d 720, 756-759 (2d Cir. 1965), cert. denied, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966).)

In the present case a jury heard over fifty-five witnesses who by their total testimony demonstrated that Allen and Alexander fraudulently took two-million

dollars from the public for bond issues which were never delivered. Appellant was forced into the position of attempting to refute this evidence so that he could prove his lack of knowledge and participation during his short tenure with R. J. Allen in its final days. The transference of guilt manifested itself in the fact that the government conclusively proved the existence of the crimes and the commission thereof by the time petitioner was hired, thus shifting the burden to petitioner to convince the jury that he was not guilty beyond a reasonable doubt.

Severance should be granted when the evidence against one defendant is far more damaging than the evidence against the moving party. (United States v. Bolden, 169 U.S. App. D.C. at 47, 494 F.2d at 966, United States v. Leonard, 160 U.S. App. D.C. at 47, 494 F.2d at 966; United States v. Gambrill, 142 U.S. App. D.C. at 83, 86, 449 F.2d at 1159, 1162; McHale v. United States, 130 U.S. App. D.C. 163, 164, 398 F.2d 757, 758, cert. denied, 393 U.S. 985, 89 S.Ct. 462, 21 L.Ed.2d 447.)

Where one defendant's role as the conspiracy by way of act or time frame is lesser than his co-defendants, severance should be granted to avoid the taint and transference of guilt, so that the defendant may be afforded a fair trial. (United States v. Mardian, 546 F.2d 973 (1976); United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).)

In this particular case this argument becomes stronger when coupled with the fact that a co-defendant offered to give exonerating evidence which most probably would have resulted in an acquittal, but which the Court refused to let the jury hear.

2. The Court of Appeals Has Decided a Federal Question In Conflict With This Court's and Other Court of Appeals' Decisions and Has Sanctioned a Departure By a Lower Court Requiring This Court's Supervision In an Instance Where the Trial Court's Refusal to Sever Petitioner's Case Resulted In a Denial Of His Right to a Fair Trial and Due Process Of Law.

The Court of Appeals concluded that the demands of economy of judicial effort compel affirmance of the lower court's action for the following reasons:

1. To postpone petitioner's case would either delay Alexander's case or cause 3 separate trials to be conducted, instead of two;

2. The trials would involve the same factual testimony;

3. Brewer's testimony was not needed because "most of the same facts had

been brought out earlier by the government." (See Appendix A, infra);

4. There was ample evidence to bring petitioner into the sphere of illegal activities charged in the indictment.

The exercise of this Court's power of supervision is mandated in this case because the Court of Appeals' conclusions are based on an erroneous analysis of the facts contained in the record on appeal. This erroneous analysis led to the improper conclusion that the needs of judicial economy prevailed over the petitioner's allegation that he was denied a fair trial.

Petitioner now recites the correct state of the facts in this case in relation to the points raised in the Court of Appeals decision:

a. The Number of Trials:

On July 14, 1977, petitioner requested that his trial follow co-defendant Brewer's trial so that Brewer could testify for him, based on an affidavit signed by Brewer.

On July 18, 1977, the Court relieved Brewer's attorney and ordered Brewer's case severed from Alexander and petitioner. From that point forward there was no question that there were going to be two trials; the only question was whose trial would be first.

The Court acknowledged the fact that new counsel for Brewer would need time to prepare the case. Both the government and defense requested a continuance.(C.T. July 18, p. 16) The Court had previously denied petitioner's motion to sever, without prejudice, on the grounds that Brewer's affidavit was insufficient, but then ordered petitioner's attorney not to speak to Brewer until new counsel was appointed. Petitioner's request for a continuance was based on the premise that he had to wait until Brewer had a new attorney in order to obtain an affidavit from Brewer.

By ordering petitioner's trial to commence the next day, prior to the appointment of new counsel, the Court closed the door on the possibility of obtaining an affidavit from Brewer. Had the Court continued both trials for a week or two no interest adverse to judicial economy would have been created. Rather, a short continuance at that point would have resolved any question concerning Brewer's relevancy. Alternatively, the Court could have ordered Brewer and Alexander to be tried together first; thus having two trials and Alexander's trial would not then be unduly delayed.

b. The Testimony At Separate Trials:

Had the order of the trials been reversed so that Brewer went first by himself or with Alexander the testimony presented by the government would have been the same or less. Had petitioner's trial followed Brewer's trial and had he been tried alone, the fact of the matter is that only 4 government witnesses testified against petitioner. The factual basis against petitioner was not the same and the events alleged did not arise until petitioner's employment in late 1973 or early 1974.

Actually, the interests of judicial economy could have been best served had Brewer and Alexander been tried together in that the factual basis of the government's witnesses was identical as to these two defendants. The interests of a fair trial would have been best served had petitioner been tried alone so that the taint of Alexander's deeds would not rub off onto petitioner. (See Argument No. I, Reasons For Granting the Writ.) Herein, petitioner was the only defendant who had a unique interest in being tried separately and later. (Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1971.)

c. The Need For Brewer's Testimony:

The Court of Appeals holds that most of Brewer's testimony was elicited from government witnesses, i.e., ALLEN. However, Allen was a convicted felon whose testimony was obtained because Allen was expecting leniency. Allen's direct testimony was impeached by other witnesses, leaving any favorable testimony regarding petitioner subject to a finding by the jury as not credible.

Had Brewer given direct testimony on the subjects stated by Allen there would have been independent corroboration. Further, Brewer's testimony would not be open to the attack that he was testifying to save himself, as was the case with Allen.

The true state of the evidence in this case is that not one government witness testified to implicate petitioner to the charge of conspiracy or the substantive counts until the government called Harold Goldstein.

Harold Goldstein had previously testified before the Grand Jury and gave no evidence against petitioner. He changed his testimony at trial and stated that the conspiracy was masterminded by petitioner who carried the scheme out and knew that the representations made by R. J. Allen were false, including the financial statement of AMC. Goldstein testified that all these matters were related to him by Brewer outside the presence of petitioner.

We note that the Court of Appeals, in determining that there was sufficient evidence against petitioner noted the following factors in support of its conclusions:

1. Petitioner assumed Alexander's responsibilities after Alexander left;

2. He exercised control over the funds;

3. He provided false and misleading information to the accountant preparing a financial statement;

4. He was accorded a position of power and influence over the activities of the company.

We note that petitioner offered through Brewer's affidavit and the representations of Brewer's attorney that Brewer would testify that each one of these alleged facts were false.

We further note that the evidence as to factors #2, #3 and #4, came from the purported conversation between Brewer and Goldstein and concerning which, Brewer was prepared to testify did not occur.

Additionally, the evidence presented by the government through Rider was that Rider prepared the financial statement and that Rider obtained verification, by letter, from Brewer as to the assets of AMC. Brewer's testimony that petitioner did not know that the assets were falsified by Brewer would have exculpated petitioner from the most damaging testimony adduced at his trial.

d. The State Of the Evidence:

The evidence cited in the Opinion of the Court of Appeals came primarily from twice convicted felon Goldstein's recitation of a conversation between he and Brewer, which Brewer would have denied had he testified.

The erroneous analysis of the record made by the Court of Appeals has resulted in a misapplication of the appropriate law.

Where severance has been denied, "the paramount question, however, is always whether refusal of the severance impairs the fairness of the trial." (United States v. Shuford, 454 F.2d 772, 777-78 n. 5 (4th Cir. 1971).)

We note the recent case of United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977) wherein the Court of Appeals, in noting the requirement of relevance of a co-defendant's testimony, held that the proposed testimony "very possibly would have had the jury to acquit . . ." (Emphasis added).

In the present case the mere fact that petitioner was hired by R. J. Allen for the last months of its existence and assumed the administrative duty of cutting expenses was certainly insufficient to convict petitioner of crimes which require active participation, intent and knowledge. (United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), United States v. Owen, 5 Cir. 1974, 492 F.2d 1100, United States v. Barrera, 547 F.2d 1250 (5th Cir. 1977), United States v. Oliva, 497 F.2d 130 (5th Cir. 1974) and United States v. Suarez, 487 F.2d 236 (5th Cir. 1973).)

The only evidence which incriminated petitioner in the conspiracy, guilty knowledge and intent came most from Goldstein's alleged conversation with Brewer. However, in viewing the total evidence cited by the Court of Appeals, it is evident that Brewer's testimony would have refuted the government's entire case against petitioner

and therefore, the proposed testimony, more than very possibly, would have led the jury to acquit.

In United States v. Vigil, supra, the Court concluded:

> "The trial court's exercise of its discretion in this case came from a commendable desire to save time. But the court abused its discretion in refusing to sever the trials upon the reliable representation that Vigil would testify for Baca if the trials were severed."

Brewer's testimony that petitioner was not a member of the conspiracy; that petitioner did not know of any illegal scheme and did not participate in it; that he had no control or authority over the policies of the company; did not participate in sales or misrepresentations to customers, such as false representations regarding insurance; and did not participate in or have knowledge of the falsity of the financial statement of the financial statement of AMC, went to the heart of the inconsistencies of the government's case and directly refuted the only evidence sufficient to support a conviction.

Under the guidelines set forth in United States v. Vigil, supra, the Ninth Circuit; Byrd v. Wainwright, supra, the Fifth Circuit, and United States v. Echeles, 352 F.2d 892 (7th Cir. 1965); the denial of petitioner's motion to be tried separately and subsequently to co-defendant

Brewer constituted a denial of petitioner's right to due process and his right to a fair trial.

We note that the denial of a fair trial resulted in a two-prong fashion; to wit: Petitioner was tainted by evidence admitted against Alexander which spun onto him and by the elimination of the exculpatory testimony of Brewer.

In conjunction with this deprivation of due process and denial of a fair trial, it is noted that at the trial petitioner's counsel objected to Goldstein's hearsay testimony, because there was insufficient evidence aliunde of the existence of a conspiracy. This issue was also raised on appeal, pursuant to United States v. Apollo, 476 F.2d 156, 159 (5th Cir. 1973), Garbo v. United States, 314 F.2d 718 (4th Cir.) cert. den., 377 U.S. 953 (1963). The fact of the matter is that no witness, except Goldstein, offered any evidence connecting petitioner to the conspiracy count.

The denial of fundamental constitutional rights in this case presents itself as a "Catch 22" situation in which petitioner; first, was subjected to reams of testimony implicating Alexander in a multi-bond issue fraud, pre-dating petitioner's employment with the company; Second, by virtue of this testimony was required to disprove the taint by proving his innocence beyond a reasonable doubt; third, was denied the right to present the proof of his innocence by not being able to produce Brewer's testimony; and finally, was convicted upon the hearsay

statements of convicted felon Goldstein, which were erroneously admitted and which petitioner was not permitted to refute.

Petitioner states that he was deprived the fundamental constitutional guarantees of due process of law and the right to a fair trial.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this Writ issue.

Respectfully submitted,

GLADYS TOWLES ROOT
Attorney for Petitioner

APPENDIX A

UNITED STATES v. VASILIOS

UNITED STATES of America,
Plaintiff-Appellee,
v.
I. VASILIOS, a/k/a Bill Vasilios, and
Howard W. Alexander,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,
v.
James W. BREWER,
Defendant-Appellant.

Nos. 77-5743, 78-5148.

United States Court of Appeals,
Fifth Circuit.

July 5, 1979.

Defendants were convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of mail fraud, securities fraud and conspiracy to commit such offenses, and they appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) restrictions on cross-examination imposed in lower court did not rise to level of interference with one defendant's Sixth Amendment rights and error in limiting cross-examination was not so prejudicial as to result in an abuse of discretion; (2) trial court did not abuse its

discretion in failing to grant one defendant's motion for severance; (3) evidence was sufficient to support jury's finding that one defendant had guilty knowledge of fraudulent activities charged in indictment and that he had specific intent to defraud, and (4) trial court gave proper instruction to jury concerning introduction of evidence of extrajudicial statements of alleged co-conspirators.

Affirmed.

1. Criminal Law - 662(1)
Right of an accused to effectively cross-examine an adverse witness is embodied in confrontation clause of Sixth Amendment. U.S.C.A. Const. Amend. 6.

2. Witnesses - 267
Although trial judge is granted discretion to restrict scope and extent of cross-examination, such discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy Sixth Amendment. U.S.C.A. Const. Amend. 6.

3. Witnesses - 329
Impeachment of witness comports with constitutional standards when defense counsel is allowed to expose to jury facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to reliability of witness. U.S.C.A. Const. Amend. 6.

4. Witnesses - 345(1)

Al evidentiary uses of a prior nolo plea by witness are not prohibited.

5. Criminal Law - 662(1)

Witnesses - 372(2)

Restrictions on cross-examination, disallowing line of questioning in which defense counsel tried to show bias of witness through defendant's intention to testify against witness, did not rise to level of interference with defendant's Sixth Amendment rights and error in limiting cross-examination was not so prejudicial as to result in an abuse of discretion. U.S.C.A. Const. Amend. 6.

6. Criminal Law - 622(2)

In prosecution for mail fraud, securities fraud and conspiracy to commit such offenses, trial court did not abuse its discretion in failing to grant one defendant's motion for severance. Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x; 18 U.S.C.A. §§ 371, 1341.

7. Criminal Law - 1134(8)

On appeal, standard used to review denial of motion for judgment of acquittal is substantially the same as standard used in determining whether evidence is sufficient to support guilty verdict, taking view most favorable to Government.

8. Conspiracy - 47(5)

Post Office - 49(11)

Securities Regulation - 199

In prosecution for mail fraud, securities fraud and conspiracy to commit such offenses,

evidence was sufficient to support jury's finding that one defendant had guilty knowledge of fraudulent activities charged in indictment and that he had specific intent to defraud. Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x; 18 U.S.C.A. §§ 371, 1341.

9. Criminal Law - 779

In prosecution for mail fraud, securities fraud and conspiracy to commit such offenses, trial court gave proper Apollo type instruction to jury when extrajudicial statements of alleged coconspirators were introduced into evidence at trial. Securities Act of 1933, §§ 17(a), 24, 15 U.S.C.A. §§ 77q(a), 77x; 18 U.S.C.A. §§ 371, 1341.

Appeals from the United States District Court for the Southern District of Florida.

Before WISDOM, GOLDBERG and VANCE, Curcuit Judges.

VANCE, Circuit Judge:

The convictions appealed in this case arise out of a complex scheme to defraud investors purchasing industrial revenue bonds. Howard Alexander, James Brewer and I. Vasilios, participants in the plan, were found guilty of mail fraud, securities fraud and conspiracy to commit those offenses. 18 U.S.C. § 1341; 15 U.S.C. §§ 77q(a), 77x; 18 U.S.C. § 371. Appellants Alexander and Vasilios were tried jointly; Brewer was tried alone. Their cases, however, have been consolidated for this appeal.

The principal issues presented to this court are peculiar to the appellant urging them: whether the trial court unduly restricted Alexander's cross-examination of a prosecution witness; whether Vasilios' motion for severance should have been granted; whether the trial court erred in failing to give a cautionary instruction to the jury before a coconspirator's hearsay statements were admitted against Brewer; and whether the evidence was sufficient to support Vasilios' conviction.[1] After considering the arguments advanced by the parties, we conclude that the convictions should be affirmed.

Cross-Examination

[1] Alexander complains that the trial judge unduly restricted his cross-examination of

---

1. Also raised as errors are insufficient evidence supporting Alexander's conviction; admission of a coconspirator's hearsay statement against Vasilios when the conspiracy was insufficiently proved; and fatal variance between the indictment and proof adduced at the trial of Vasilios and Alexander. We have reviewed these contentions, but find them to be without merit.

R. J. Allen[2] by refusing to allow him to ask whether the witness knew that Alexander had planned to testify against him in a Texas criminal action. Alexander contends that this refusal denied him the opportunity to establish Allen's bias and that the denial was constitutional error since it prevented him from exercising his sixth amendment right to confront his accuser by effectively cross-examining him.[3]

[2-4] Although the trial judge is granted discretion to restrict the scope and extent of cross-examination, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976),

> this discretionary authority . . . comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.

United States v. Bass, 490 F.2d 846, 858 n. 12 (5th Cir. 1974), quoted in United States v. Elliott,

---

2. Allen was indicted on conspiracy, mail fraud and securities fraud charges along with Alexander. He pleaded guilty prior to trial.

3. The right of an accused to effectively cross-examine an adverse witness is embodied in the confrontation clause of the sixth amendment. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); United States v. Brown, 546 F.2d 166 (5th Cir. 1977).

571 F.2d 880 (5th Cir.), cert. denied, ___ U.S. ___, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). Impeachment of a witness comports with constitutional standards when defense counsel is allowed to

> expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

The record in the case is replete with references discrediting Allen and his testimony. Jurors were aware that he was testifying pursuant to a plea bargaining agreement; that he was a convicted felon; that he had a drinking problem; and that his business association with Alexander had been marred by frequent conflicts over management of their jointly-owned underwriting firm. When defense counsel tried to show bias through Alexander's intention to testify against Allen,[4] the trial judge disallowed the line of questioning because Alexander's decision to testify was based on a plea bargaining agreement

---

4. Alexander had no opportunity to testify against Allen because Allen pleaded guilty in the Texas criminal action. This fact strengthens our conclusion that Alexander was not prejudiced by the court's ruling. The degree of bias resulting from an unrealized intention to testify adversely in a previous action, if any, is slight indeed.

under which he pleaded nolo contendere. The government argued for exclusion, claiming that it could not bring out Alexander's nolo plea in rebuttal. The lower court erroneously adopted this position. Contrary to the government's contention all evidentiary uses of a prior nolo plea are not prohibited. The government's brief on appeal cites United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), cert. denied, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977), as support, but Morrow is inapposite, since it held only that a plea of nolo contendere may not be used

> for the purposes of impeachment or to show knowledge or intent in a proceeding different from that where the plea was offered.

Id. at 142 (footnote omitted). In Alexander's case, the nolo plea would have been used to expose all of the factors surrounding the creation of Allen's alleged bias by revealing Alexander's motive for testifying in the Texas trial. It would not have been used to impeach the defendant, Alexander, or to show his intent to commit similar crimes. Cf. Kilgore v. United States, 467 F.2d 22 (5th Cir. 1972) (plaintiff's prior nolo plea in criminal tax fraud case could be used in cross-examining his character witness in subsequent suit for tax refund).

Even though the court erred in holding the evidence inadmissible, we find that the defendant was not prejudiced by this error. Allen was subjected to rigorous and effective cross-examination resulting in over one hundred fifty pages of transcript. The jury was sufficiently

apprised of other bases on which Allen's credibility was vulnerable to attack. See United States v. Teller, 412 F.2d 374 (7th Cir. 1969), cert. denied, 402 U.S. 949, 91 S.Ct. 1603, 29 L.Ed.2d 118 (1971). The issue of possible bias was also brought before the jury through Allen's testimony concerning past business dealings with Alexander.[5]

---

5. The jury could infer bias from Allen's testimony elicited on direct examination:

> [ALLEN] Well at this point there was friction going on between the two of us.
> [FARRAR] And what was the friction over?
> [ALLEN] Just the concept in running a business.
>
> There was an awful lot of expense and we were going one direction and going down, and there was no way to pull ourselves up or out of it, unless something was done.
>
> He was not going to buy me out and I thought the best thing would be to have him bought out.

On cross-examination, Allen testified,

> [BERGER] In the fall of 1973, things were getting pretty heated between you and Mr. Alexander, is that not correct?
> [ALLEN] We saw better days.
>
> It became more heated -- around July -- it was not as bad towards that time.
> [BERGER] Things were not getting heated between you and Mr. Alexander in October or Nobember of 1973?

(continued on p. 10)

[5] We conclude that the restrictions on cross-examination imposed in the lower court did not rise to the level of interference with Alexander's sixth amendment rights and that the error in limiting the corss-examination was not so prejudicial as to result in an abuse of discretion. See Gordon v. United States, 438 F.2d 858 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 56 (1971).

---

5. (continued from previous page)

> [ALLEN] The word "heated" -- I'm having difficulty trying to understand what you mean by "heated."
>
> . . . . . .
>
> [BERGER] Do you recall testifying in January of 1977, under oath -- page 195 -- that somewhere in the time around October or November -- "And I think between Bill Alexander and I things were getting a little heated" -- what did you mean by "getting a little heated"?
> [COURT] Would you read the question and answer, please?
> [BERGER] "Q. When did that first come to your attention?
> "A. Some time around October or November things between Bill Alexander and I were getting a little heated."
>
> . . . . . .
>
> [ALLEN] I don't think Bill Alexander and I ever had a mean word towards each other or heated; it was just a feeling that was in the air. That's what I mean by it.

MOTION FOR SEVERANCE AND SUBSEQUENT TRIAL

Four days before trial, Vasilios moved for a trial separate from and subsequent to that of his codefendant, Brewer, in order to introduce his exculpatory testimony. Because Brewer's appointed counsel withdrew from the case on the eve of trial, the lower court severed Brewer's trial from that of Vasilios and Alexander. Vasilios' request for a subsequent trial, however, was denied.

Vasilios concedes that the decision to grant a motion for severance or for a subsequent trial is vested in the sound discretion of the trial court, United States v. Martinez, 486 F.2d 15 (5th Cir. 1973) (severance); Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970) (trial sequence), but argues that the court's failure to grant his motion in this case occasioned such prejudice that his trial was rendered fundamentally unfair. See Byrd v. Wainwright.

Brewer submitted affidavits to the district court stating that he would be willing to testify at Vasilios' trial if it were held after his trial. The proffered testimony indicated that Vasilios exercised no independent authority in his job with Allen's underwriting firm and that his job responsibilities in the firm were directed toward cutting expenses and delivering purchased bonds. This testimony would have proved, Vasilios maintains, that he could not have been involved in the fraudulent practices charged in the indictment.

Although a severance was ultimately granted in this case, the guidelines announced by this circuit to be considered in determining when a refusal to grant a severance motion constitutes a denial of fair trial may be of aid in deciding whether the court's refusal to order Vasilios' trial subsequent to Brewer's resulted in a denial of due proess:

> (1) Does the movant intend or desire to have the codefendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?
>
> (2) Will the projected testimony of the codefendant be exculpatory in nature, and how significant, must the effect be? How does the defendant show the nature of the projected testimony and its significance? Must he in some way validate the proposed testimony so as to give it some stamp of verity[?]
>
> (3) To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify?
>
> (4) What are the demands of effective judicial administration and economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance.
>
> (5) If a joint trial is held, how great is the probability that a codefendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?

Byrd v. Wainwright, 428 F.2d at 1019-20 (footnotes omitted).

[6] Here, however, all of the Byrd criteria were not met. Specifically, the "demands of effective judicial administration and economy of judicial effort" compel the affirmance of the lower court's action. When faced with the decision to postpone Vasilios' and Alexander's trial until after Brewer's, the court had the choice of either delaying Alexander's day in court or severing Alexander's and Vasilios' joint trial, which would have resulted in three separate trials on the same factual testimony. These alternatives are not outweighed by Vasilios' need for Brewer's testimony. Indeed, most of the same facts had been brought out earlier by the government. Further, there was ample evidence available to bring Vasilios into the sphere of illegal activities charged in the indictment. The trial court did not abuse its discretion in failing to order a later trial.

Judgment of Actuittal

Vasilios also argues that the lower court erred in failing to grant his motion for judgment of acquittal. He contends that the evidence is insufficient to support the jury's finding that he had guilty knowledge of the fraudulent activities charged in the indictment and that he had a specific intent to defraud.

[7, 8] On appeal, our standard of review is substantially the same as the standard used in determining whether the evidence is sufficient to support a guilty verdict, taking the view most favorable to the government. United States v. Fontenot, 483 F.2d 315, 319 (5th Cir. 1973). The record reveals that, upon the dissolution of

Allen and Alexander's partnership, Vasilios assumed Alexander's administrative responsibilities at the underwriting firm and covered for Allen during his frequent drinking binges. He exercised control over the firm's funds. Vasilios provided false and misleading information to the accountant preparing a financial statement for a shell company for whom the underwriting firm was handling a bond issue. These circumstances reveal that Vasilios was accorded a position of power and influence over the activities of the underwriting firm, which, he concedes, was involved in the fraudulent sale of bonds. It may easily be inferred that he was a part of the conspiracy to defraud purchasers of the industrial revenue bonds. See United States v. Netterville, 553 F.2d 903 (5th Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977). The false representations made to the accountant indicate that he possessed specific intent to defraud. The lower court did not err in refusing to grant a judgment of acquittal as to Vasilios.

Coconspirator Instructions

Brewer's sole contention is that the court erred in failing to give an Apollo-type instruction to the jury when extrajudicial statements of his alleged coconspirators were introduced into evidence at his trial. See United States v. Apollo, 476 F.2d 156 (5th Cir. 1973). We do not agree.

[9] The instruction given was in substantial compliance with Apollo. Even if it were not, however, the standards and procedures established in Apollo were recently abolished by this court

in United States v. James, 590 F.2d 575 (5th Cir. 1979). Although the requirements established in James are to be applied prospectively only, id. at 583, we hold that reversal for a trial court's failure to follow Apollo is not mandated when no substantial rights of the defendant were violated.

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. Court of Appeals
F I L E D
AUG 30 1979
Edward W. Wadsworth
Clerk

No. 77-5743

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
versus

I. VASILIOS, a/k/a Bill Vasilios and HOWARD W. ALEXANDER,

Defendants-Appellants.

No. 78-5148

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
versus

JAMES W. BREWER,

Defendant-Appellant.

- - - - -

Appeals from the United States District Court for the Southern District of Florida

- - - - -

ON PETITIONS FOR REHEARING

(August 30, 1979)

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied

ENTERED FOR THE COURT:

/s/ Robert J. Vance
United States Circuit Judge

Supreme Court, U. S.
FILED
OCT 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

I. VASILIOS,

79-611

Defendant and
Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and
Respondent.

ADDENDUM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

GLADYS TOWLES ROOT
454 South Muirfield
Los Angeles, California
(213) 936-7019

Attorney for Petitioner

VOLUME II

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

I. VASILIOS,

Defendant and
Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and
Respondent.

ADDENDUM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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VOLUME II

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. _____

I. VASILIOS,

Defendant and
Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and
Respondent.

ADDENDUM TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

QUESTIONS PRESENTED

---

1. Did the admission into evidence of co-defendant Brewer's extrajudicial statement directly implicating petitioner with the alleged crimes violate petitioner's Sixth Amendment right to confrontation?

2. What are the trial court's responsibilities to avoid Confrontation Clause violations, without limiting the introduction of evidence at trial?

3. Under what circumstances, if any, may a trial court permit the admission of an extra-judicial statement, despite serious jeopardy to a defendant's right to confrontation, as an alternative to restricting its exercise of discretion in furtherance of judicial economy?

REASONS FOR GRANTING THE
WRIT

Not since 1970 has the United States Supreme Court issued a major pronouncement on the Confrontation Clause of the Sixth Amendment. In a series of decisions beginning in 1965, the Court delineated the intricacies in determining Confrontation Clause violations. The instant case provides an opportunity for further clarification of the developing doctrine, and raises, for the first time, the question of the trial judge's responsibilities to avoid Confrontation Clause violations without limiting the introduction of evidence at trial.

While courts have long struggled with the question of what substantive limitations, if any, are placed by the Confrontation Clause on the introduction of evidence, it was in Pointer v. Texas, 380 U.S. 400 (1965) that the Supreme Court began to delineate the precise relationship between the right of confrontation and the introduction of evidence. In Pointer the alleged victim testified against the defendant

at the preliminary hearing, at which the defendants were unrepresented by counsel. At trial, the Government introduced, over objection, the transcript of the preliminary hearing, because the victim was unavailable to testify at trial. Writing for a unanimous Court, Justice Black reversed the convictions as violative of the Sixth Amendment right to confrontation. The Court explained that the Confrontation Clause includes: first, a right of cross-examination, a central purpose of which is to "expose falsehood and bring . . . out the truth in the trial of a criminal case." 380 U.S. at 404; and second, intrinsic "fundamental" values, essential to due due process. Id. at 404-405. On the other hand, the Court observed, the dictates of the Clause are not absolute; some evidence, technically hearsay, may nevertheless be admissible where the evidence in question satisfied certain yet unspecified indicia of reliability. Id. at 407.

In a companion case, Douglas v. Alabama, 380 U.S. 415 (1965), the Supreme Court further elaborated upon its Pointer reflections. The Court in Douglas addressed the question, left open in Pointer, of which hearsay declarations, when admitted into evidence without affording proper cross-examination of the declarant, constitute a violation of the Confrontation Clause. In Douglas two defendants were tried separately on charges of assault to murder. After the first defendant, Loyd, was convicted, he was called to testify at the trial of the second. Because he planned to appeal his conviction, however, Loyd refused to answer any questions. Thereupon, the prosecutor read aloud to the

jury Loyd's confession, which incriminated the petitioner.

In unanimously reversing the petitioner's conviction, the Court elucidated that hearsay evidence which is both harmful to the defendant and essential to the prosecution's case is of the variety which is violative of the Confrontation Clause. Hearsay which is harmful to the defendant includes (1) testimony substantially linking the defendant to the crime; and (2) testimony which names or identifies the defendant as a participant. Furthermore, hearsay which is essential to the prosecution's case emphasizes the concern that admission of the hearsay was not harmless error.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court introduced a new element, the ineffectiveness of a curing instruction, to the developing doctrine. In Bruton, two defendants, Evans and Bruton, were jointly tried. At trial, the Court admitted into evidence testimony of Evan's extrajudicial statement implicating Bruton as an accomplice. An instruction limiting the jury's use of the confession as against Evans, but not Bruton, was given. In reversing Bruton's conviction, the Court explained that the hearsay statement which was "powerfully incriminating" of Bruton could not be cured by a limiting instruction. The Court re-emphasized the harm-focused concept of Douglas and introduced the consideration of risk that the jury would make improper use of the inadmissible hearsay. Id. at 135.

So, as of 1968, the application of the Confrontation Clause, for purposes of regulating the introduction of hearsay evidence, required consideration of several factors. These included: the harm to the defendant; the essentiality of the evidence to the prosecution's case; the possible ineffectiveness of curing instructions; and, to some extent, the inherent reliability of the evidence. In the years following Bruton, the Supreme Court's emphasis shifted to a consideration of the reliability of the hearsay evidence.

In California v. Green, 399 U.S. 149 (1970), the Court established "reliability" as a prominent factor in the Confrontation Clause analysis. In that case, the Court considered the conviction of Green for the sale of marijuana to a minor, Porter. At Green's trial, Porter, called as a witness by the prosecution, could not recall the underlying facts of the sale. Thereupon, the prosecution successfully introduced, for substantive purposes, the testimony which Porter had given at a preliminary hearing. The trial court also admitted into evidence incriminating statements made by Porter while in police custody. The California Supreme Court upheld the reversal of Green's conviction, holding unconstitutional the California statute under which Porter's statements were admitted.

The United States Supreme Court vacated the judgment. The Court, emphasizing that there is not a complete "congruence" between hearsay and confrontation, 399 U.S. at 155, explained that the "core" of the Confrontation Clause is the "literal right to 'confront' the witness at time of trial. . . ." Id. at 157. Because Porter was

available for cross-examination at trial, and because his preliminary hearing testimony was contemporaneously subject to cross-examination, the Court found no constitutional infirmity in its introduction against Green. However, the Court remanded the cause for consideration whether Porter's inability to recollect at trial was sufficient to establish the reliability of Porter's statements to the police.

In holding that the use at trial of a witness' extrajudicial statement as substantive evidence did not violate the Confrontation Clause, so long as the witness was available for competent cross-examination, the Court underscored the significance of the reliability of the hearsay evidence. The Court distinguished Pointer, Douglas, and Bruton on the ground that the declarants in those cases were not available for cross-examination. Id. at 162-163.

In its holding in Green, the Court also postponed further elaboration of the concept, developed in the prior cases, that it is the effect of the introduction of hearsay evidence on the defendant's claim to innocence and the prosecution's attempt to prove its case that is controlling under a Confrontation Clause analysis. It was unnecessary for the Court in Green to proceed to a consideration of effect, for in Green the basic assumption underlying an effect analysis, namely the non-existence of cross-examination of the declarant, was absent. Consequently, in Green the Court indicated that the admissibility of hearsay evidence will not be violative of the Confrontation Clause if sufficiently reliable, that is, subjected to

competent cross-examination, regardless of the effect of its introduction at trial.

The complexity of the Confrontation Clause doctrine was exemplified by the Supreme Court's next decision, Dutton v. Evans, 400 U.S. 74 (1970) wherein, perhaps due to that complexity, the Court reached no majority decision. In that case, the prosecution presented twenty witnesses implicating Evans in an alleged murder. One of these witnesses, Shaw, testified that a third culprit, Williams, had told him in a spontaneous declaration, of Evans' guilt. Williams was not called to testify, but his statement to Shaw was admitted at trial against Evans. In a 5-4 decision, the Court reversed the Fifth Circuit's granting of habeas corpus, and remanded for other issues raised in Evans' motion.

Writing for the plurality, Justice Stewart held that no Confrontation Clause violation had occurred. At the crux of the opinion was the Court's conclusion that: (1) the need for cross-examination of the declarant was obviated by sufficient "indicia of reliability" id. at 89, of the truth of the statement, based on the spontaneity of Williams' remark and its adverseness to his penal interest; and (2) the hearsay statement was not "crucial" or "devastating," id. at 87, to the defendant's case, as the prosecution presented other significant proof of guilt.

Thus, Supreme Court doctrine delineating the precise relationship between the Confrontation Clause and the introduction of evidence is imbued with intricacies. The Supreme Court has set forth

the relevant factors, which must be applied to the circumstances of each case; (1) the extent to which the declarant of the extrajudicial statement was subjected to competent cross-examination; (2) whether the extrajudicial declaration was so plainly reliable or so merely cumulative that cross-examination of the declarant would be superfluous; (3) the degree to which the challenged declaration directly accuses the defendant or otherwise links him to the crime; (4) the degree to which the challenged declaration is essential or significant to the prosecution's case; (5) whether, and the degree to which, the admissibility of the hearsay declaration creates a risk that the jury will improperly use it against the defendant. The equation is no doubt complex, and the answer rarely evident.

Applying these factors to the instant case, a significant new inquiry, or refinement, of Supreme Court doctrine emerges. At the outset, reference to the identity of the challenged hearsay declaration is in order. At trial, Harold Goldstein testified that co-defendant Brewer stated to him that Brewer and petitioner had devised the scheme to defraud, implemented such scheme and falsified a financial statement provided AMC (RT pp. 2156, 2186). Therefore, Brewer's extrajudicial statement to Goldstein, introduced to prove petitioner's guilt, was hearsay, admitted by way of Goldstein's in-court testimony.

The hearsay declarant, co-defendant Brewer was never subjected to cross-examination, and no other indicia of reliability of Brewer's statement was presented. (Green, Pointer, Dutton.)

Brewer's statement, however, directly accused and linked the petitioner with the commission of the alleged crimes. (Douglas, Bruton.) It is particularily noteworthy that the Fifth Circuit's opinion cites petitioner's "false and misleading information to the accountant preparing a financial statement (opinion at 6000), a conclusion derived principally, if not totally, from Goldstein's testimony, as strong evidence of petitioner's involvement in the fraudulent conspiracy. Moreover, the significance of the declaration to the prosecution's case is underscored by the paucity of other evidence introduced by the prosecution incriminating the petitioner in the knowing participation in a fraudulent scheme. (Douglas, Dutton.) Given the significance of the hearsay declaration, its admissibility undoubtedly created a substantial risk that the jury improperly used it to convict the petitioner. (Bruton.)

In light of such an apparent violation of petitioner's right to confrontation, the trial court, nevertheless, permitted the admission of the hearsay declaration. What is astounding is that there appeared a reasonable opportunity for the court to avoid a Confrontation Clause problem. The petitioner made four separate motions for severance, indicating to the Court that Brewer would provide testimony exonerating the petitioner if petitioner's trial was held subsequent to his trial (C.T. p. 3-5). Mr. Dean, Brewer's attorney, testified that if the Court alleviated the threat to Brewer's Fifth Amendment right against self-incrimination by modifying the sequence of trials, Brewer would deny that petitioner had any control over the underwriting firm, nor had any knowledge

of a false financial statement (RT p. 2848). Brewer would also testify that the alleged conversations with Goldstein never occurred (RT p. 2262). Nevertheless, the Court denied all four motions for severance, opting to permit the admission of evidence of Brewer's hearsay declaration under circumstances seriously jeopardizing the petitioner's Sixth Amendment right to confrontation.

The issue which this honorable Court should decide is what are the trial court's responsibilities to avoid Confrontation Clause violations without limiting the introduction of evidence at trial. More specifically, under what circumstances, if any, may a court permit the admission of a hearsay declaration, despite serious jeopardy to the defendant's Sixth Amendment right to confrontation, as an alternative to restricting its exercise of discretion to further the goal of judicial economy? In light of the complexity of Supreme Court doctrine, this as an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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